IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

STEWART B. FRESH, Plaintiff, vs. ENTERTAINMENT U.S.A. of TENNESSEE, INC., d/b/a PLATINUM PLUS, et al., Defendants.	)	02 CV 2674 Ml/P

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR SANCTIONS DUE TO SPOLIATION OF EVIDENCE PURSUANT TO FED. R. CIV. P. 37

Before this court is the plaintiff's Motion for Sanctions Due to Spoliation of Evidence Pursuant to Fed. R. Civ. P. 37, filed June 30, 2003. Defendant Entertainment U.S.A. of Tennessee, Inc. d/b/a Platinum Plus (hereinafter "Platinum Plus") filed a timely response in opposition to the plaintiff's motion on July 10, 2003. The plaintiff's motion was referred to the United States Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

I. BACKGROUND

On August 26, 2002, the plaintiff, Stewart B. Fresh, filed a complaint against Platinum Plus and various other individuals,

seeking damages for negligence, assault, battery, false imprisonment, and outrageous conduct. The plaintiff alleges in his complaint that on the night of January 20, 2002, he and several friends entered the Platinum Plus nightclub in Memphis, Tennessee. The plaintiff asserts that shortly after entering the club, he went to the bar to get a drink. While at the bar area, the plaintiff claims that employees of Platinum Plus physically removed him from the club and took him out to the parking lot. Once outside, the plaintiff alleges that several other employees of the club joined them.[1] When the plaintiff asked for an explanation as to why he was ejected from the club, he claims that he was physically restrained with handcuffs, sprayed with pepper spray, and beaten about his head causing severe injuries.

On October 21, 2002, the defendants filed an answer to the complaint. In their original answer, the defendants alleged that the plaintiff was a patron of the Platinum Plus nightclub on January 13, 2002, not on January 20, 2002 as alleged in the complaint. The defendants further asserted that on January 13, the employees of the club physically ejected the plaintiff after he inappropriately touched one of the club's performers.

II. Plaintiff's Motion for Sanctions

Platinum Plus contends that during the course of discovery in

[1]The complaint alleges that these employees were off-duty Memphis Police Department officers hired by Platinum Plus to provide security for the club.

this case, it learned that the plaintiff was not the same individual who was involved in the altercation at the club on January 13, 2002. The defendant contends that by the time it discovered this error, the videotape for January 20 had already been recycled through Platinum Plus' video recording system and, in effect, destroyed. Moreover, once Platinum Plus learned that the videotape for January 13 was no longer relevant to this litigation, Platinum Plus put this tape back through its video recording system and recorded over that tape as well.

As a result of the destruction of the recorded material on these two videotapes, on June 30, 2003, the plaintiff filed this Motion for Sanctions Due to Spoliation of Evidence Pursuant to Fed. R. Civ. P. 37. In his motion, the plaintiff asserts that Platinum Plus intentionally destroyed the videotape recording it made on January 20, 2002, the night on which the plaintiff alleges he was assaulted by individuals working at the nightclub. Plaintiff claims that the January 20 videotape would have shown certain defendants assaulting him in Platinum Plus' parking lot. Plaintiff alleges that Platinum Plus knew all along that the incident occurred on January 20, and that it intentionally recorded over that tape under the guise of confusion. Plaintiff also contends that in Platinum Plus' discovery response dated March 14, 2003, Platinum Plus falsely represented to the plaintiff that it did not have any videotapes for January 13, 2002 when, in fact, the

videotape was still preserved at that time.

With respect to the destruction of the January 20 videotape, the plaintiff asks the court for the following relief: (1) that the court prohibit Platinum Plus from denying that the plaintiff was assaulted, battered, and falsely imprisoned on January 20, 2002, as alleged in the complaint; or (2) that the court give the jury an adverse inference instruction. With respect to Platinum Plus' March 14, 2003 discovery response, the plaintiff asks the court to impose appropriate monetary sanctions and award attorney's fees and costs.

In its response, Platinum Plus admits that it recorded over the January 20 videotape, but claims that it was an innocent mistake and was not done intentionally. It also denies providing false information in its March 14 discovery response.

This court conducted a hearing on the motion on July 30, 2003. Counsel for all interested parties attended. Counsel for Platinum Plus called Michele Lunati Wall as a witness. The plaintiff did not present any evidence or call any witnesses. After the hearing, the court requested and received (without objection from the parties) a copy of the deposition of Demetrios "Jimbo" Kollias, the manager of Platinum Plus. The plaintiff also submitted a Notice of Filing of Supplemental Exhibits In Support of Motion For Sanctions on August 8, 2003, which attached as exhibits the defendants' Memorandum of Law in Support of Motion in Limine and the cover page

of plaintiff's deposition which was taken on March 7, 2003.

After careful consideration of the statements of counsel, the deposition and hearing testimony of the witnesses, the relevant memoranda of law and exhibits, and the entire record, this court submits the following proposed findings of fact and conclusions of law, and recommends that the plaintiff's motion for sanctions regarding the January 20 videotape be denied. In addition, this court recommends that the plaintiff's request for attorney's fees concerning the discovery of the January 13 videotape be granted.

III. PROPOSED FINDINGS OF FACT

These proposed findings of fact are based on, among other things, the deposition and hearing testimony of Mrs. Wall, who the court finds credible. The court has also considered the memoranda of law and various exhibits, including the depositions of Ralph Lunati and Demetrios "Jimbo" Kollias. Based upon the entire record, the court makes the following proposed findings of fact:

Mrs. Wall is employed as the Secretary/Treasurer for Platinum Plus. In this capacity, Mrs. Wall is also responsible for maintaining a video surveillance system utilized at Platinum Plus. The video surveillance system consists of eight cameras which record the entrance lobby, the exits, the parking lots, the bar area, and the safe. One VHS videotape documents one full week of recordings. Mrs. Wall ordinarily changes the tapes out every Monday. She is the only employee responsible for the rotation and

preservation of the videotapes.[2] If an incident involving an employee and a patron of Platinum Plus occurs, each employee involved in the incident is required to file an incident report with Mrs. Wall. Upon receiving an incident report, Mrs. Wall removes from circulation the videotape that recorded the date in question and preserves it. Mrs. Wall uses ten numbered videotapes, and it is her policy that if no incident is reported, the tapes are put back into circulation, and reused in no particular order. If an incident occurs that warrants preserving a videotape, Mrs. Wall's policy is to preserve that tape for one year. The video surveillance system was working on January 13 and January 20, 2002.[3]

On February 22, 2002, the plaintiff's counsel's law firm sent a letter to Platinum Plus, which stated that the plaintiff would be initiating a claim for damages surrounding an incident at the club on January 20, 2002. The letter identified the plaintiff only by his name. At the time she received this letter, Mrs. Wall had several incident reports filed by employees of Platinum Plus concerning an incident with a patron that occurred on January 13,

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[2]In the event Mrs. Wall is on vacation or out sick, this responsibility falls on one of the other managers. There is no indication that anyone other than Mrs. Wall was responsible for the tapes during January 2002.

[3]However, there is no evidence that anyone ever reviewed either of these tapes to determine what was recorded on these tapes.

2002, but did not have any incident reports for January 20. The incident reports for the January 13 incident identified the patron as an unknown male. This led Mrs. Wall to believe that the plaintiff's law firm had the wrong date, and that the incident in question occurred on January 13 – not January 20 as indicated in the letter. Mrs. Wall took the videotape for January 13 out of rotation and secured it with the incident reports filed for that date. Mrs. Wall usually does not review the videotapes, and she never reviewed the videotape from January 13 or January 20.[4] Because Mrs. Wall was under the impression that the January 20 videotape was not at issue, she put that tape back into circulation and recorded over the tape.

On August 26, 2002, the plaintiff filed the instant complaint against Platinum Plus and other individuals, alleging that the incident occurred on January 20. By that time, the January 20 videotape had already been recorded over and effectively

[4]At the hearing, Mrs. Wall testified that after receiving the February 22 letter from plaintiff's counsel, she contacted the plaintiff's law firm and informed them that she believed they had the wrong date. Mrs. Wall testified that the plaintiff's counsel then sent a subsequent letter which stated that the date of the incident was January 13, 2002. Plaintiff's counsel stated at the hearing that he was unaware of a subsequent letter indicating January 13, 2002 as the date of the incident. The only letter presented to the court for consideration was the letter of February 22, 2002, attached as an exhibit to Mrs. Wall's deposition.

destroyed.[5] On October 21, 2002, Platinum Plus and the other defendants filed answers claiming that the incident occurred on January 13.

On January 6, 2003, defendants' counsel, Sean Hunt, received from plaintiff's counsel photographs of the plaintiff, which depicted injuries he allegedly suffered on January 20, 2002. On January 7, 2003, at the scheduling conference in this case, Mr. Hunt advised the District Court that there was some confusion about the exact date of the incident. At that time, based upon Mr. Hunt's comments, the defendants had not yet determined whether the incident on January 13 involved the plaintiff or someone else.

On January 30, 2003, the plaintiff served Platinum Plus with a request for production of documents. In this request, the plaintiff asked for "any videotaped footage taken on the Platinum Plus premises including but not limited to, interior and exterior cameras on January 13, 2002 and January 20, 2002." At the time that Platinum Plus received this discovery request, the January 13 videotape had not yet been recycled and was still preserved by

[5]Mrs. Wall testified in her deposition and at the hearing that she utilizes ten videotapes with the surveillance system, which are rotated in no specific order. Each videotape records one weeks worth of footage. A full seven months had passed between the January incident and the filing of the complaint. Therefore, the nine videotapes (omitting the January 13 tape already preserved) would have been recycled several times over by the time the complaint was filed in this case.

Platinum Plus.[6]

On March 7, 2003, the plaintiff was deposed. After the plaintiff's deposition and disclosure of photographs, Platinum Plus manager Demetrios Kollias concluded that the patron involved in the incident on January 13, 2002 was not the same individual as the plaintiff.[7] On March 14, 2003, Mrs. Wall signed Platinum Plus' discovery response, representing that no videotapes existed for either January 13 or January 20. It is unclear to the court whether the videotape of January 13 was still in existence and preserved on March 14, 2003.[8] On April 8, 2003, the defendants amended their answers to reflect that the plaintiff was not involved in an altercation at the nightclub on January 13, 2002.

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[6]As indicated in the defendants' Memorandum of Law in Support of Motion in Limine (filed July 25, 2003), the defendants were not able to confirm that January 13 was the incorrect date until after they took the deposition of the plaintiff on March 7, 2003. Moreover, Mrs. Wall testified at her deposition that she learned about the incorrect date around the time of Mr. Kollias' deposition, which took place on March 18, 2003. The defendants did not amend their answers until April 8, 2003.

[7]See Defendants' Memorandum of Law in Support of Motion in Limine (filed July 25, 2003).

[8]Mrs. Wall testified at the hearing that she did not know whether the January 13 videotape was still preserved when she signed Platinum Plus' discovery response. The plaintiff contends that during Mrs. Wall's deposition, she stated that she did not learn that the January 13 videotape was unrelated to this litigation until after the deposition of Mr. Kollias, which took place on March 18, 2003. The court's reading of Mrs. Wall's deposition, however, indicates that Mrs. Wall first learned about this error from Platinum Plus' attorney, Sean Hunt, during the time "around Jimbo's [Kollias] deposition."

IV. PROPOSED CONCLUSIONS OF LAW

A. The January 20, 2002 Videotape

As a threshold matter, the court notes that the plaintiff's prayer for relief is based on Fed. R. Civ. P. 37. This procedural rule, however, does not apply to the destruction of evidence prior to the initiation of a lawsuit. See Beil v. Lakewood Eng'g and Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994) ("Rule 37 does not, nor does any procedural rule, apply to actions that occurred prior to the lawsuit.") Therefore, the plaintiff cannot rely on Rule 37 for sanctions concerning the destruction of the January 20 videotape which, as discussed above, was destroyed prior to the filing of the complaint. Instead, in diversity cases such as the one at bar, "[t]he rules that apply to the spoiling of evidence and the range of appropriate sanctions are defined by state law." Nationwide Mut. Fire Ins. Co. v. Ford Motor Co., 174 F.3d 801, 804 (6th Cir. 1999); see also Beil, 15 F.3d at 552; Welsh v. United States, 844 F.2d 1239, 1243 (6th Cir. 1988). Therefore, this court must look to Tennessee law.

The Sixth Circuit has not yet addressed spoliation of evidence under Tennessee law. See Busch v. Dyno Nobel, Inc., No. 00-1808, 2002 WL 1608340, at *14 (6th Cir. July 18, 2002) (unpublished opinion) (interpreting Michigan law and stating that "[i]n denying the plaintiff's motion for a hearing on spoliation, the magistrate

judge found that the plaintiff failed to create a genuine factual question as to whether the deliberate destruction of evidence had occurred."); Nationwide Mutual Fire Ins. Co., 174 F.3d at 804 (interpreting Ohio law to define spoliation as intentional destruction of evidence "for the purpose of rendering it inaccessible or useless to the defendant in preparing its case; that is, spoiling it."); Welsh, 844 F.2d at 1248 (interpreting Kentucky law to allow a trial court to give an adverse inference instruction when a party negligently destroys evidence). Thus, this court must examine the case law from Tennessee. In doing so, this court's task

> is to make [the] best prediction, even in the absence of direct state court precedent, of what the [state] Supreme Court would do if confronted with this question. In that inquiry [this court] may rely upon analogous cases and relevant dicta in the decisional law of the State's highest court, opinions of the State's intermediate appellate courts to the extent that they are persuasive indicia of the State Supreme Court direction, and persuasive opinions from other jurisdictions, including the "majority rule."

Welsh, 844 F.2d at 1245 (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938)).

It is submitted that, under Tennessee law, an adverse inference jury instruction is an appropriate sanction for spoliation of evidence only if the destruction of the evidence was done intentionally and for an improper purpose. See Leatherwood v. Wadley, No. W2002-01994-COA-R3-CV, 2003 WL 327517, at *18-19 (Tenn. Ct. App. Feb. 11, 2003) (unpublished opinion) (explaining that the

doctrine of spoliation of evidence "permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence"; court concluded that there were no facts to show intentional destruction of evidence or improper intent); Eady v. CIGNA Property & Casualty Co., No. M1998-00524-SC-WCMCV, 1999 WL 1253092, at *2-3 (Tenn. Dec. 27, 1999) (unpublished opinion) (adopting Special Workers' Compensation Appeals Panel's findings of fact and conclusions of law; explaining that under Foley v. St. Thomas Hospital, the spoliation or destruction of evidence must be intentional, and that "there was no proof offered at trial to show that the appellee purposefully destroyed the previous testing records.");[9] Foley v. St. Thomas Hospital, 906 S.W.2d 448, 454 (Tenn. Ct. App. 1995) (citing language in Walsh that "if there was proof that the cremation was done for the improper purpose of destroying evidence, the appellants could move the trier of fact to draw adverse inferences from such conduct," and further stating that "[w]e think [Tennessee] should adopt such a rule in the proper case."); Thurman-Bryant Elec. Supply Co., Inc. v. Unisys Corp., Inc., No. 03A01-CV00152, 1991 WL 222256, at *5 (Tenn. Ct. App. March 16, 1992) (unpublished opinion) (citing Am.Jur.2d., Evidence, § 177, for the proposition that "a presumption or inference arises,

[9]See Tenn. Sup. Ct. R. 4 (stating that unpublished opinions under these circumstances shall be considered persuasive authority).

however, only where the spoliation or destruction was intentional, and indicates fraud and a desire to suppress the truth, and it does not arise were the destruction was a matter of routine with no fraudulent intent").

In this case, there is insufficient evidence that Platinum Plus intentionally and for an improper purpose destroyed the January 20 videotape. Although plaintiff's counsel notified Platinum Plus in the February 22 letter of the incident, Mrs. Wall mistakenly believed that the incident occurred on January 13. Mrs. Wall took steps to preserve the January 13 videotape, but placed the January 20 tape back into circulation. There is no evidence that Mrs. Wall or anyone associated with this litigation destroyed the January 20 videotape in order to hide the tape's contents from the plaintiff. Therefore, it is submitted that the plaintiff's request for sanctions against Platinum Plus for spoliation of the January 20 videotape should be denied.[10]

B. The January 13, 2002 Videotape

As discussed in the Proposed Findings of Fact above, at the

[10]The plaintiff has also asked the court to sanction the defendant by preventing the defendant from denying the allegations in the plaintiff's complaint at trial. This requested sanction, of course, is much more severe than an adverse inference instruction. Given the court's conclusions above, this more severe sanction is likewise not appropriate in this case. Moreover, the court need not decide whether this more severe sanction would ever be an appropriate sanction in a case where a party has intentionally destroyed evidence for an improper purpose.

time that Platinum Plus was served with the plaintiff's request for discovery of the January 13 videotape, that videotape in its preserved form was still in Platinum Plus' possession. The defendant's position at that time, as set forth in its original answer, was that the incident occurred on January 13. Although it is unclear to the court whether the January 13 tape was still preserved on March 14, 2003 – when Mrs. Wall, on behalf of Platinum Plus, responded to the plaintiff's discovery request by stating that no videotape existed – the defendant's conduct relating to the disposal of that tape nevertheless was an abuse of discovery. Even though Platinum Plus had in its hands both the plaintiff's discovery request and the January 13 videotape, Platinum Plus improperly made an independent determination that the January 13 videotape was no longer relevant, put the tape back into circulation, and stated in its discovery response that no tape existed. Platinum Plus violated the rules of discovery regardless of whether the videotape was put back into circulation before or after March 14, 2003. Thus, sanctions are appropriate in this case under Fed. R. Civ. P. 37.[11]

The court submits that the appropriate sanction is to grant the plaintiff's request for attorney's fees and costs in pursuing this motion, to be paid by defendant Platinum Plus. However, due

[11]Had the court concluded that the January 13 videotape was destroyed after March 14, then sanctions would also have been available under Fed. R. Civ. P. 26.

to the fact that the defendants have amended their answers to reflect that the incident did not occur on January 13, the plaintiff is not prejudiced by the destruction of the January 13 videotape. Therefore, the court submits that no further sanctions are warranted.

V. RECOMMENDATION

It is submitted that under Tennessee law, Platinum Plus lacked the requisite intent necessary to assess a sanction for spoliation of the January 20 videotape. It is further submitted that Platinum Plus violated Fed. R. Civ. P. 37 by destroying the January 13 videotape after receiving the plaintiff's discovery request, and that an award of attorney's fees and costs is an appropriate sanction against Platinum Plus. Plaintiff's counsel shall file an affidavit with the court within seven (7) days from the date of this order, setting forth in detail counsel's fees and costs associated with the filing and arguing of the present motion.

Respectfully submitted this _____ day of August, 2003.

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TU M. PHAM
U.S. MAGISTRATE JUDGE